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IN THE UNITED STATES DISTRICT COURT
 THE NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ELIZABETH A. HOLMES and RAMESH
 “SUNNY” BALWANI,

Defendants.

Case No. CR-18-00258-EJD

**MOTION FOR ORDER DIRECTING
 THE GOVERNMENT TO CEASE AND
 DESIST POST-INDICTMENT USE OF
 THE GRAND JURY PROCESS TO
 OBTAIN DISCOVERY**

**Date: October 1, 2018
 Time: 1:30 p.m.
 CTRM.: 4, 5th Floor**

Hon. Edward J. Davila

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on October 1, 2018, at 1:30 p.m., or as soon thereafter as the matter may be heard, in Courtroom 4, located at the San Jose Courthouse, 280 South First Street, San Jose, CA 95113, Defendants Ramesh Balwani and Elizabeth Holmes will move this Court for an order directing the government to cease and desist its post-indictment use of the grand jury process to obtain discovery.

Defendants bring this Motion pursuant to Criminal Local Rules 12-1 and 47-1. The Motion is based on this Notice, Memorandum of Points and Authorities, the Declaration of Jeffrey Coopersmith, the record in this case, oral argument as permitted by the Court, and any other matters that the Court deems appropriate.

DATED: September 7, 2018

DAVIS WRIGHT TREMAINE LLP

By: /s/ Jeffrey B. Coopersmith
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Attorney for Defendant
RAMESH BALWANI

MEMORANDUM OF POINTS AND AUTHORITIES

Defendants Ramesh Balwani and Elizabeth Holmes move this Court for an order directing the government to cease and desist its post-indictment use of the grand jury to obtain discovery in this case.

Three months after an indictment was returned in this matter, the government is currently seeking to enforce a broad grand jury subpoena (the “Subpoena”) issued to Theranos, Inc. (“Theranos”) on September 6, 2017, and to cause the production of hundreds of thousands—if not millions—of pages of documents. The indictment in this case was returned on June 14, 2018, and a superseding indictment was returned on September 6, 2018—exactly a year after the Subpoena was issued. The timing, nature, and circumstances of the Subpoena demonstrate that it is being used for purposes of pretrial discovery not permitted by the Federal Rules of Criminal Procedure.

To make any ruling that the Court issues effective, Defendants request that the Court stay compliance with the Subpoena until this motion is decided.

I. FACTUAL BACKGROUND

On September 6, 2017, the government caused the grand jury to issue the Subpoena to Theranos. Declaration of Jeffrey Coopersmith (“Coopersmith Decl.”) at Ex. A. The Subpoena, calls for exceedingly broad (“All documents regarding the financial health . . . of Theranos”), vague (“All documents regarding Theranos device capabilities . . .”), and argumentative (“All documents regarding fraud . . .”) categories of documents maintained over a period of more than 15 years that are not likely to produce information relevant to any second superseding indictment to the extent that is even contemplated. *Id.* The Subpoena had a return date a month later, in October 2017. *Id.* If enforced at this late, post-indictment date, the Subpoena would call for the production of at least hundreds of thousands of pages (if not millions of pages) of additional documents. *Id.* at ¶ 6.

On June 14, 2018, a grand jury sitting in this district returned an indictment against defendants Elizabeth Holmes and Ramesh Balwani. Dkt.1. The indictment charged Ms. Holmes and Mr. Balwani each with two counts of conspiracy to commit wire fraud, in violation of

18 U.S.C. § 1349, and nine counts of wire fraud, in violation of 18 U.S.C. § 1342. *Id.* The indictment, which relates to topics reflected in the Subpoena’s document requests, alleges that Ms. Holmes and Mr. Balwani defrauded investors by making false and misleading statements regarding the capabilities of Theranos’s technology, its revenues and revenue forecasts, and its use of third party, commercially available analyzers. *Id.* at ¶¶ 11-13. The indictment also alleges that the Defendants defrauded doctors and patients through fraudulent claims about the company’s blood tests. *Id.* at ¶¶ 14-18. The superseding indictment is nearly identical, as it only adds a reference to an additional investor in Count 4. Dkt. 39.

Since the original indictment was returned in June 2018, the United States Attorney’s Office has been in contact with Theranos seeking voluminous additional documents that fall within the scope of the pre-indictment grand jury Subpoena issued in September 2017.¹ Coopersmith Decl. at Ex. B. Defendants understand that Theranos, in response to the government’s demands, has recently made arrangements to produce hundreds of thousands of documents in addition to those produced prior to the indictment, most without reviewing them. *Id.* at ¶ 6. In effect, the government is seizing many documents in Theranos’s possession to have and review as the case proceeds. A large number of the documents are covered by the company’s attorney client privilege, and it is likely that the voluminous material includes documents covered by privileges belonging to the defendants as well. *Id.* at ¶ 6 & Ex. B. Theranos has recently announced its plans to dissolve,² and Theranos lacks the resources to review the documents to protect material that is privileged, or even to review the documents to ensure that they do not contain documents protected by joint defense or common interest privileges belonging to the defendants. *Id.* at ¶ 6 & Ex. D. The government apparently has no plans to form a “taint-team” to screen privileged materials from the government’s trial team. *Id.* at ¶ 6.

¹ It is not clear whether the grand jury that issued the September 2017 subpoena is still empaneled or whether it is a different grand jury that returned the indictments in this matter.

² <https://www.wsj.com/articles/blood-testing-firm-theranos-to-dissolve-1536115130>.

On August 31, 2018, counsel for Mr. Balwani wrote a letter to the United States Attorney's Office to request the government "cease its post-indictment subpoena enforcement efforts." *Id.* at Ex. B. The letter stated, in part:

Here, we understand that the grand jury subpoena was issued in 2017, long before the grand jury returned an indictment of Ms. Holmes and Mr. Balwani. Accordingly, by definition any further production pursuant to the subpoena is not tied to the functions of the grand jury—to indict or return a no-bill. The document requests in the subpoena of which we are aware are broad, strongly suggesting that the subpoena is not tied to any plan to supersede the indictment.

Id. In an email to Theranos's counsel on September 1, the government informed Theranos that it would continue its enforcement efforts relating to the pre-indictment grand jury Subpoena and was "conscious of the fact that the company's dwindling resources leave us with limited time."

Id. at Ex. C. The government has declined to forego production under the Subpoena until the Court could rule on this dispute. *Id.* at ¶ 6.

On September 6, 2018—exactly a year after the government issued the Subpoena—the grand jury returned a superseding indictment in this case, adding only a reference to an additional investor in Count 4. *See* Dkt. 39. Undersigned counsel has communicated with counsel for the government on numerous occasions over the last several months. Government counsel did not mention the potential for a superseding indictment prior to its receipt of the August 31, 2018 letter objecting to the government's misuse of the grand jury. *Id.* at ¶ 8.

II. ARGUMENT

"Grand juries are not licensed to engage in arbitrary fishing expeditions." *United States v. R. Enters., Inc.*, 498 U.S. 292, 299 (1991). While the grand jury may be used after indictment if the investigation is related to a superseding indictment, it is also well-established that "the government should not use the grand jury for the sole purpose of pretrial discovery in cases in which an indictment has already been returned." *United States v. Star*, 470 F.2d 1214, 1217 (9th Cir. 1972); *In re Grand Jury Proceedings*, 1990 WL 116870, at *2 (9th Cir. 1990) (grand jury subpoena cannot be used "to conduct discovery or to prepare the pending indicted cases for trial"); *In re Grand Jury Subpoena Duces Tecum Dated Jan. 2, 1985 (Simels)*, 767 F.2d 26, 29 (2d Cir. 1985) ("The law is settled in this circuit and elsewhere that it is improper to utilize a

Grand Jury for the sole or dominating purpose of preparing an already pending indictment for trial.”). As the United States Attorney’s Manual instructs, “[t]he grand jury’s power . . . is limited by its function toward possible return of an indictment.” *See* U.S.A.M. § 9-11.120 (citing *Costello v. United States*, 350 U.S. 359, 362 (1956)). Moreover, “[c]ourts have general supervisory powers over the grand jury to prevent or correct abuse of its process.” *In re Grand Jury Proceedings*, 632 F.2d 1033, 1040 (3d Cir. 1980).

Because Defendants have standing to challenge the Subpoena, and because the timing and circumstances of the Subpoena show that any documents produced at this stage of the proceeding would be used predominately for pretrial discovery, the Court should direct the government to cease and desist use of the grand jury process to obtain documents under the Subpoena.

A. Defendants Have Standing to Challenge the Subpoena.

Defendants have standing to challenge a grand jury subpoena issued to a third-party on the grounds that the grand jury subpoena is being used “for the sole or dominating purpose of preparing an already pending indictment for trial.” *See Simels*, 767 F.2d at 29-30. For example, the Second Circuit in *Simels* found that the defendant’s motion to quash a grand jury subpoena issued to a third-party should be granted because the post-indictment subpoena was an “abuse of the grand jury process.” *Id.* Other courts have similarly found that “the case for letting . . . a victim of grand jury abuse be heard is stronger, rather than weaker” than many other cases where courts routinely accept “third party standing.” *In re Grand Jury*, 619 F.2d 1022, 1026-27 (3d Cir. 1980); *see also In re Grand Jury Subpoena, No. 16-03-217*, 875 F.3d 1179, 1183 n.2 (9th Cir. 2017) (website user had third-party standing to challenge grand jury subpoena). Further, because the voluminous Theranos material sought by the government could contain documents covered by joint defense or common interest privileges belonging to Defendants, it is crucial for Defendants to be able to challenge the government’s post-indictment use of the grand jury process.

Moreover, the voluminous documents Theranos would produce pursuant to the Subpoena likely include documents protected from disclosure by joint attorney-client privileges and/or

1 common interest/joint defense privileges that belong to the Defendants. Coopersmith Decl. ¶ 6.
2 Theranos has tried to erect mechanical “filters” to address certain privilege concerns. However,
3 we do not believe those filters could adequately protect against disclosure of material covered by
4 Defendants’ privileges. *See id.* Compliance with the Subpoena would therefore result not only
5 in misuse of the grand jury process but also could result in the government’s invasion of the
6 Defendants’ privileges.

7 **B. The Post-Indictment Enforcement of the Grand Jury Subpoena Is Not Within the**
8 **Scope of the Grand Jury’s Investigative Powers.**

9 The timing and circumstances of the Subpoena demonstrate that any documents produced
10 in response to the Subpoena would now be used predominately for “pretrial discovery.” *Star*,
11 470 F.2d 1at 1217 (finding that government offered “no other justification” for the grand jury
12 subpoena other than for “pretrial discovery”).

13 The grand jury Subpoena does not relate to any superseding indictment—which has
14 already been returned in this case. The grand jury Subpoena was issued to Theranos in
15 September 2017—almost nine months before the indictment and exactly a year before the
16 superseding indictment. Coopersmith Decl. at Ex. A. The Subpoena requested a broad array of
17 documents that are within the same subject matter as the indictment and superseding indictment.
18 *Id.* Mr. Balwani’s counsel challenged the government’s post-indictment efforts to obtain
19 material pursuant to the Subpoena in an August 31, 2018 letter, and a superseding indictment
20 was returned within the week—showing definitively that the documents in the Subpoena were
21 not needed for, or related to, the superseding indictment. *Id.* at Ex. B.

22 Theranos has announced it will dissolve, and the government therefore appears to be
23 eager to obtain possession of the documents in the event that it decides later that some material
24 among them is relevant in response to the defenses offered in this matter. This purpose smacks
25 of a desire to obtain pretrial discovery using the grand jury process, or perhaps simply to
26 storehouse documents that could conceivably be needed later, not to obtain the materials as part
27 of an ongoing investigation. Undersigned counsel understands that Theranos offered to place the
28 documents on a hard drive that would remain in the possession of its counsel, WilmerHale, in the

1 event that those materials might become properly discoverable in the future. *Id.* at ¶ 7. The
 2 government has demanded to take possession of the documents, but it should not be permitted to
 3 do so based on a grand jury subpoena unrelated to any genuine investigative purpose.

4 The extremely broad and vague document requests in the Subpoena further demonstrate
 5 that post-indictment use of the Subpoena is not consistent with the purpose and function of the
 6 grand jury. *Id.* at Ex. A. Based on its September 1 email, *id.* at Ex. C, the government’s theory
 7 seems to be that it can continue to use the grand jury subpoena process, regardless of whether the
 8 requests in the Subpoena relate to a contemplated superseding indictment, so long as the
 9 government can say that it did not have every scrap of information relevant to the case prior to
 10 obtaining an indictment and superseding indictment. If this were the law, there would be no
 11 limit to the government’s ability to use the grand jury process after indictment, because the
 12 government could always claim that it is entitled to use the grand jury process just in case it
 13 might find something useful with which it might seek a superseding indictment (or in this case, a
 14 second superseding indictment).

15 In its September 1 email, *id.*, the government cites to cases that articulate the principle
 16 that “the duties of the grand jury are not performed until every clue and all witnesses are
 17 examined in order to charge the proper person with the appropriate crime.” *In re Grand Jury*
 18 *Proceedings*, 586 F.2d 724, 725 (9th Cir. 1978). But this rule does not change the well-
 19 established rule that the government may not use the grand jury process to prepare for trial, and
 20 the cases cited by the government acknowledge as such. Coopersmith Decl. at Ex. C (cases cited
 21 by government); *see In re Grand Jury Proceedings*, 586 F.2d at 725 (“[I]t may be improper to
 22 call a grand jury witness solely to prepare a previously-indicted case for trial”); *In re Grand*
 23 *Jury Proceedings*, 632 F.2d at 1041 (“It is a firmly entrenched rule that once a defendant has
 24 been indicted, a prosecutor may not use a grand jury’s investigative powers for the purpose of
 25 securing additional evidence against the defendant for use in the upcoming trial.”).

26 In *Simels*, the court reversed a district court’s denial of a motion to quash issued a few
 27 weeks after the return of a superseding indictment. 767 F.2d at 29-30. There, the Second Circuit
 28 considered the “timing of the subpoena” and found that the circumstances surrounding the

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subpoena suggested that the grand jury process was being used to prepare the “pending indictment for trial.” *Id.* In reversing, the Second Circuit also recognized that the rule barring the misuse of the grand jury process “is difficult . . . to enforce” but if the rule “is to have any meaning” then a grand jury subpoena “must be quashed” when it is being used predominately for trial preparation. *Id.* Similarly, upon consideration of a motion to suppress evidence, the court in *United States v. Jeter*, found that the government’s “post-indictment acceptance of property targeted by the pre-indictment subpoena” was “improper,” as the “sole or dominant purpose” of the enforcement of the pre-indictment subpoena was to obtain “evidence against [the defendant] for use in the criminal proceeding against him.” *United States v. Jeter*, 2015 WL 114118, at *2-3 (D. Md. Jan. 7, 2015).

The government was well able to insist on full compliance with the Subpoena on the terms that it now demands for nine months prior to indictment. It did not. Now, with Theranos out of resources, the government seeks to force compliance in a manner that will grant it ongoing access to what may be the entirety of the electronic documents in Theranos’s possession. The Court should not countenance this misuse of a grand jury subpoena.

III. CONCLUSION

Defendants acknowledge that the grand jury’s investigative powers are broad, but they are not unlimited. The grand jury power is not so broad that it would allow the government to continue to use the grand jury process until it can absolutely rule out any need to supersede, because otherwise there would be no limitation. Accordingly, the Court should order the government to cease and desist its post-indictment Subpoena enforcement efforts, especially now that the government has filed a superseding indictment, to prevent use of the grand jury process predominately for pretrial discovery and to prepare the already-indicted case for trial.

DATED: September 7, 2018

Respectfully submitted,

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